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FEDERAL BUREAU OF INVESTIGATION

IN THE
SUPREME COURT OF THE UNITED STATES
CITIZENSHIP CASE NO. 101

U. S. 378

Case Number: 101
Plaintiff: [illegible]
Defendant: [illegible]
State of [illegible]

ON PETITION FOR WRIT OF HABEAS CORPUS
TO THE SUPREME COURT OF THE UNITED STATES
FILED IN OFFICE OF THE CLERK OF THE COURT

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IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1978

No. 78-

FINIS EUGENE TOOMER *Petitioner*

vs.

STATE OF ARKANSAS *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION TO CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Arkansas was rendered on June 5, 1978, and is reported at 263 Ark. 595 (1978). The majority opinion is reprinted in Appendix B of the Petition for Writ of Certiorari and a dissenting opinion, contemporaneously filed, is reprinted in Appendix C of the Petition. An unpublished opinion of the trial court is included in the Petition as Appendix A.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Arkansas Supreme Court erred in affirming the trial court's order denying Petitioner's motion to proceed *in forma pauperis*.

CONSTITUTIONAL PROVISIONS

The pertinent provisions of the Constitution of the United States are set forth in the Petition at pp. 2 and 3.

STATEMENT OF THE CASE

On November 23, 1976, Petitioner was charged with rape, in violation of Ark. Stat. Ann. § 41-1803 (Code 1976), via an Information filed in Little River County Circuit Court. The Petitioner apparently pleaded "not guilty" and was tried before a jury on May 31, 1977, in Little River County Circuit Court, the Honorable Bobby Steel presiding. The jury returned a verdict of "guilty" and sentenced the Petitioner to five (5) years' imprisonment in the penitentiary. The trial court formally entered its judgment on the verdict on June 3, 1977, and on the same day Petitioner filed his Notice of Appeal, whereupon the trial court set appeal bond at \$15,000, which the Petitioner made.

On June 13, 1977, the trial court granted the petitioner the maximum seven-month extension in which to docket his appeal, extending the date to January 3, 1978. On December 7, 1977, the petitioner filed a motion in Circuit Court seeking to be declared an indigent and asking that the state bear the cost of producing the record. The circuit judge was ill, and on

December 30, 1977, the petitioner filed a Motion for Extension of Time to File a Complete Transcript and a Motion to Declare the Defendant an Indigent in the Arkansas Supreme Court.

The State responded to this Motion, and on January 16, 1978, the Arkansas Supreme Court entered an Order granting the Extension of Time and reinvesting the trial court with jurisdiction to determine the question of indigency. The trial court had, in fact, conducted a hearing on that issue on January 11, 1978, and in an Order of January 16, 1978, denied the Petitioner's Motion to Proceed as an Indigent.

The petitioner then filed an appeal of this Order, filing a transcript of the indigency hearing and his Motion for Permission to File a Typewritten Brief with the Arkansas Supreme Court on February 3, 1978. The State responded to this Motion on February 13, 1978, and the Petitioner's Motion was denied by the Court on February 20, 1978.

Subsequently, the petitioner filed an appeal to the Arkansas Supreme Court on the same issue before the Court on February 3, 1978, and the decision of the trial court was affirmed on June 5, 1978, Howard, J., dissenting, reported at 263 Ark. 595 (1978).

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION TO BE DECLARED AN INDIGENT, FOR THE TRANSCRIPT AND RECORD AT THE COUNTY'S EXPENSE, AND FOR THE APPOINTMENT OF COUNSEL ON APPEAL.

Respondent respectfully submits that the proper question to be addressed to this Court is not whether "an indigent, but able-bodied individual, having been convicted of a felony, and desiring an appeal to the Court of last resort in the State is entitled to a transcript with which to appeal and the appointment of counsel on appeal" (Brief for Petitioner, p. 2); but rather, whether the trial court abused its discretion in denying indigency status to the petitioner under the particular facts and circumstances of this case.

The question as presented by Petitioner was long ago addressed by this Court in *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1955) and *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). The State of Arkansas does not question the right of an indigent defendant to a record of his trial and representation by counsel on appeal. The sole question presented, rather, is whether Petitioner legitimately qualifies as an indigent.

The relevant facts upon which the Arkansas Supreme Court relied in affirming the trial court's determination that Petitioner was ineligible for an adjudication of indigency are as follows. Petitioner was a 19 year old, single male (V. II, T. 40), a high school graduate (V. II, T. 15), and a former athlete

without physical defects (V. II, T. 40). He was represented by private, retained counsel at his trial (V. II, T. 25, 26, 41, 44, 48) and has been free on \$15,000 bond since his trial (V. I, T. 37; V. II, T. 42). No one had discussed the possibility of applying for indigency status with him until December, 1977 (V. II, T. 29, 42, 50, 51). He had been employed in the past (V. II, T. 16, 22, 23), had been living with his father in Texas for some time since the trial, and had no living expenses (V. II, T. 37, 38, 40, 41). He did not look for a job in the Ashdown, Arkansas, area (V. II, T. 39), and had never applied for unemployment benefits (V. II, T. 39). Petitioner had been employed since mid-December, 1977, with a subcontracting firm in Texas, installing windows at an alleged rate of \$2.50 per window (V. II, T. 22, 23), and, at the time of his hearing, had made \$150.00 in seventeen days (V. II, T. 40).

The Court in *Dreyer v. Jalet*, 349 F. Supp. 452, 459 (S.D. Tex. 1972), said:

In order to preclude fraudulent or careless motions of poverty, the applicant moving for *in forma pauperis* status should state "with some particularity, definiteness and certainty" the facts as to his poverty. *Jefferson v. United States*, 277 F. 2d 723, 725 (9th Cir.), cert. den., 364 U.S. 896, 81 S. Ct. 227, 5 L. Ed. 2d 190 (1960). Further, when the totality of the circumstances involved are weighed against the applicant's statement of poverty, and the result suggests incongruity, the court may go beyond the mere statement of income and inquire into additional relevant matters including the applicant's earning capacity and ability.

The incongruity herein is manifest. Petitioner alleged in his Motion to Declare the Defendant an Indigent that he has "diligently sought employment" and "has found it impossible to obtain employment or any other means to raise the money to pay the cost of appeal." (V. II, T. 2) The testimony at the hearing, however, belies that assertion. Petitioner's attempts to secure employment were not diligent, he being able to name only four places where he had filled out formal applications (V. II, T. 27), aside from the two temporary or part-time jobs he obtained through the efforts of members of his immediate family. The testimony thereby demonstrated the incongruity of Petitioner's assertions.

Petitioner's reliance on the reasoning in the dissent written by Justice George Howard, Jr., of the Arkansas Supreme Court, is misplaced, as the volley levelled therein hits wide of the mark. Justice Howard's objection is based on what he views as the majority's reliance on the bare facts of Petitioner's physical ability and the lateness of the request for a free transcript and appointed counsel. However, the majority's basis for its affirmation of the trial court's denial, subtly articulated, is that the trial court did not abuse its discretion since Petitioner did not demonstrate good faith or reasonable diligence in his attempt to raise the money required for his appeal.

As the Supreme Court of Washington so aptly stated, "... we do not deem it an undue burden upon Petitioner to require that he demonstrate to the court a good faith effort on his part to fully utilize his credit and business assets before turning to the public coffers." *State v. Rutherford*, 63 Wash. 2d 949, 956, 389 P. 2d 895 (1964). Petitioner herein has failed to meet the burden of showing a good faith effort to raise the money required for his

appeal, a determination the trial court reasonably made from the testimony at the hearing.

"To proceed *in forma pauperis* is a privilege, not a right," *Smart v. Heinze*, 347 F. 2d 114, 116 (9th Cir.), *cert. denied*, 382 U.S. 896 (1965), and the granting of permission to proceed *in forma pauperis* is within the sound discretion of the court. *Willer v. Dickson*, 314 F. 2d 598 (9th Cir. 1963). There must be a clear abuse of the court's discretion in order to justify revising a refusal of permission to proceed *in forma pauperis* (CF. 56 Geo. L. J. 516, 525 [1968]). Here the petitioner has not demonstrated such abuse.

CONCLUSION

For the reasons and authorities set forth herein, respondent prays that a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ray Hartenstein, Assistant Attorney General, do hereby certify that a copy of the foregoing Brief for Respondent In Opposition has been served upon petitioner by placing three (3) copies of the same in the United States mail, postage prepaid, to Potter & Potter, Attorneys at Law, 522 Hickory Street, Texarkana, Arkansas 75502, attorneys for the petitioner, on this 21st day of November, 1978.

RAY HARTENSTEIN
ASSISTANT ATTORNEY GENERAL